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The State Action Antitrust Exemption: The Confinement of the Parker Doctrine within the Emerging Formula

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Since the enactment of the Sherman Act in 1890, business entities have sought exemption from its operation. A number of exemptions have been created, several of them sweeping in effect. Some were created by federal regulatory statutes that expressly limit competition in the industries to which they apply;[1] other exemptions have evolved from judicial interpretations of the antitrust statutes. One of the most fundamental judicial exemptions was born in the Supreme Court decision in *Parker v. Brown*.[2] *Parker* developed the "state action exemption" by holding that the Sherman Act was inapplicable to the states. Analysis of the judicial interpretation of *Parker* and its progeny reveals

1. In addition to the federally regulated industries there are express congressional statutes which create exemptions for organized labor, agriculture, insurance, and certain export associations. Illustrative of legislation expressly granting exemption from the scope of the antitrust laws are 7 U.S.C. §§ 291-92 (1970) (Capper-Volstead exemption for agricultural cooperatives); 15 U.S.C. § 1012 (1970) (McCarran-Ferguson exemption for state regulation of insurance); 15 U.S.C. § 62 (1970) (Webb-Pomerance exemption for export trade associations); 15 U.S.C. § 17 (1970) (exempting labor, agricultural and horticultural associations); 15 U.S.C. § 45(a)(2) (1970) (exempting state supervision of resale price maintenance).

2. 317 U.S. 341 (1943). Alternative theories to the exemption doctrine of *Parker* include state immunity under the eleventh amendment, *see* Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir. 1957), and the immunity of federal officials acting within the scope of their designated duties, *see* Barr v. Matteo, 360 U.S. 564 (1959).

There is also a related doctrine whereby a business entity is exempt from the application of the antitrust laws if it is compelled to do something anticompetitive by a foreign sovereign. The same rationale which underlies the *Parker* decision also provides the basis for this grouping of cases, *i.e.*, if a business entity has been compelled to undertake anticompetitive conduct and not merely authorized to partake in such activity, then an exemption will be applied. The exemption will not cover a situation where the foreign sovereign has merely delegated the power to restrain competition to the business entity. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

A difficult issue which has arisen within this realm of cases is whether ownership by a foreign power gives a corporation carte blanche to participate in anticompetitive behavior that disrupts United States competitive markets. In essence, can a government by agreement immunize its co-conspirators? Untold diplomatic difficulties arise when the foreign sovereign considers the activity of the corporation to be "political" and hence exempt from competitive business regulations, while the United States considers the conduct to be "commercial" and therefore subject to antitrust application.

considerable refinement of the state action exemption.[3] The Supreme Court departed from the *Parker* interpretive trend, however, in *Cantor v. Detroit Edison Co.*[4] in July 1976.

Prior to the *Cantor* decision, *Parker* traditionally had been cited for the proposition that both state regulatory agencies *and* the private parties under their jurisdiction were exempt from the application of the federal antitrust laws if their conduct constituted "state action." The Court in *Cantor* concluded, however, that the *Parker* exemption could be invoked only by the state and did not extend to immunize the private party, in that case a state-regulated industry. By virtue of this confinement of *Parker*, regulated private parties are no longer protected with the antitrust exemption that had been effective since 1943. Numerous state regulated industries confront a "Hobson's choice" of either complying with state regulation and thereby subjecting themselves to federal antitrust liability or complying with the federal antitrust laws at the risk of incurring state regulatory sanction. Of course, an industry that runs afoul of a state law can raise federal preemption of the law by way of a defense. Likewise, federal declaratory judgment actions are available to establish the duties of a business entity in light of conflicting laws. Nevertheless, the *Cantor* decision

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Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972); United States v. Deutsches Kalisynidikat, 31 F.2d 199 (S.D.N.Y. 1929); *In re* Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952); *In re* Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298, 318-20 (D.D.C. 1960). A number of judicial decisions outside of the antitrust arena have been helpful in drawing the distinction between the "political" and "commercial" activities of foreign governments in relation to the doctrine of sovereign immunity. *See generally* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964).

Foreign government interests have created several new problems related to antitrust and the exemption issue which will only be resolved through future judicial decisions. The first problem occurs when a foreign government acts as the director of a cartel. The second concerns a government giving a monopoly to private suppliers, thus creating a supply shortage. The final problem occurs when a foreign sovereign attempts to get United States companies to boycott other United States companies of which the foreign sovereign does not approve for political reasons.

3. The term "exemption" is not used in its technical sense but rather as a term of antitrust law art to denote any statutory or judicial doctrine which expressly or impliedly immunizes certain otherwise anticompetitive activities from the operation of the federal antitrust laws. Technically, the term "exemption" is not correctly used in *Parker* and subsequent cases. *Parker* held that the federal antitrust laws were not intended to apply to state-sanctioned conduct; the *Parker* rule is therefore one of *non-applicability* rather than exemption. Inasmuch as the commentators and courts that have considered the *Parker* doctrine have referred to it as an exemption, however, this Note adopts the same terminology.

4. 428 U.S. 579 (1976).

is likely to cause uncertainty within the business community and among state policy makers whose jurisdictions may well be circumscribed by the broad federal antitrust laws.

In this Note the apparent problem created by the *Cantor* decision will be analyzed within the framework of the state action exemption doctrine as it has evolved from its inception to the present. The Note will begin with a detailed discussion of the *Parker* case and its evolution through various judicial decisions up to the *Cantor* case. Next, the trends within the *Cantor* court will be analyzed in detail to show how the state action doctrine has been reformulated. The Note will conclude with an assessment of the current status of a judicially created exemption for states and for regulated private parties.

Parker v. Brown and the State Exemption Doctrine

Although often referred to as the first case to deal with state mandated anticompetitive activity, *Parker* was not the first case to confront the issue of state sanctioned restraints upon competition. Five years after the enactment of the Sherman Act, in *Lowenstein v. Evans*,[5] state agents were granted the exclusive right to manufacture all liquor sold within South Carolina; the result was essentially a state approved monopoly in the retail liquor industry.[6] Suit was brought by a North Carolina liquor manufacturer whose shipment to South Carolina had been seized by South Carolina officials. The district court dismissed the complaint, reasoning that the action was brought against the state itself,[7] not against a "person" or "corporation" as contemplated by section 7 of the Sherman Act.[8]

Some years later the United States Supreme Court in *Olsen v. Smith*[9] considered the claim of harbor pilots licensed by the state of Texas who sought to enjoin an unlicensed pilot service in the port of Galveston. Although the defendants contended that the licensing program created a monopoly in violation of the Sherman Act, the Court upheld the system, reasoning:

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5. 69 F. 908 (C.C.D.S.C. 1895). Other cases prior to *Parker* which tangentially considered issues relevant to state action exemption were American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (official foreign government action is not subject to Sherman Act application), and United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (private antitrust action was allowed against the defendant because he had failed to follow the explicit method allotted by Congress for obtaining immunity).

6. 69 F. at 910-11.

7. *Id.* at 910.

8. Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210. Section 7 was repealed and, in effect, replaced by § 4 of the Clayton Act, 15 U.S.C. § 15 (1970).

9. 195 U.S. 332 (1904).

> [I]f the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law.[10]

The Court stated that the defendants' antitrust contentions, considered in their "ultimate aspect," amounted simply to an assertion that the Texas regulations were not void for a lack of proper authority but rather for injudiciousness. Even assuming such a contention to be valid, the Court concluded that the plaintiffs' remedy nonetheless was to be pursued through the legislature. The judiciary, declared the Court, lacks the authority to abrogate the power of the states to exercise domination with respect to local industries, over which they have plenary power.[11]

The full potential of an antitrust defense to a claim of state regulated anticompetitive activity, however, was not fully realized until the Supreme Court decision in *Parker v. Brown*.[12] *Parker* arose as the result of a suit filed by a California raisin producer and packer to enjoin the state director of agriculture and other state employees from enforcing a raisin prorate marketing program authorized by the California Agricultural Prorate Act.[13] The plaintiff contended that the California program was invalid to the extent that it conflicted with the federal Agricultural Marketing Agreement Act[14] and violated both the commerce clause[15] and the Sherman Act.[16]

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10. *Id.* at 345.

11. *Id.* Only four years prior to *Parker*, the Court considered the issue of federal action immunity in United States v. Rock Royal Co-op., Inc., 307 U.S. 533 (1939). Federal action cases constitute a completely separate realm of judicially created exemptions from the state action exemption of *Parker*. Because in federal action cases the court is concerned with the activities of federal officials, any statements relating to state activity are only dicta. Much of the underlying economic rationale utilized by the *Parker* Court in 1943 was discussed in detail in *Rock Royal*.

12. 317 U.S. 341 (1943).

13. 1933 Cal. Stats. 1969.

14. Act of June 3, 1937, ch. 296, §§ 1-6, 50 Stat. 246, *as amended*, 7 U.S.C. §§ 601-24 (1970).

15. Ninety-five percent of the California raisin crop found its way into interstate or foreign commerce. 317 U.S. at 345.

16. *Parker* was originally viewed by the commentators as significant for its interpretation of the commerce clause. The Sherman Act issues were not part of the plaintiff's original complaint and therefore were not litigated in the trial court. The trial court predicated its opinion only upon the commerce clause. 39 F. Supp. 895 (S.D. Cal. 1941). When the case came before the Supreme Court, it was the Court, on its own motion, which requested the Solicitor General of the United States to file an *amicus curiae* brief and directed the parties to discuss whether the California statute was preempted by the Sherman Act. The parties responded with curt contentions to the Sherman Act question. Conversely, the Solicitor General fully briefed and

California's comprehensive agricultural program was designed to permit a majority of growers to elevate commodity prices artificially and restrict production. Producers were compelled by the act to allocate fixed percentages of their raisin crop, part to a stabilization pool and part to a surplus pool to ensure that bumper raisin crops would not impair market stability. All raisin producers, moreover, were required to operate within the confines of the Act in order to enter the market, and state regulatory sanctions were imposed for violations.[17]

The federal district court granted a decree permanently enjoining the prorate raisin marketing program, but the United States Supreme Court reversed, categorically dismissing each of the plaintiff's contentions. Although upholding the validity of the raisin program under the Sherman Act, the Court determined in dicta that the program would have violated the Sherman Act only if it had been promoted solely by private persons without state mandate.[18] The Court further held that if Congress had so desired, it could have expressly prohibited such state regulatory plans in the Sherman Act through its power under the commerce clause.[19] Writing for a unanimous Court, Justice Stone followed a dual sovereign approach and found no hint that the Sherman Act was intended to be a restraint either upon state action itself or upon private activity directed by the state,[20] he stated:

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argued the Sherman issues, concluding that the California statute was in violation of the Sherman Act; his position was, of course, discounted by the Court.

17. 317 U.S. at 347.

18. *Id.* at 350.

19. *Id.*

20. *Id.* at 351. Prior to the passage of the Sherman Act the congressional debate was concerned with restrictive practices by individuals and corporations. White, *Participant Governmental Action Immunity from the Antitrust Laws: Fact or Fiction?*, 50 TEX. L. REV. 474, 482 (1972) [hereinafter cited as White]. Congress almost inserted specific language concerning state action into the Sherman Act through a proposed amendment by Senator Wilson of Iowa. His amendment would have withdrawn from the Act's coverage "any arrangements, agreements, associations, or combinations among persons for the enforcement and execution of the laws of any State enacted in pursuance of its police powers; nor shall this act be held to control or abridge such powers of the States." 21 CONG. REC. 2658 (1890). Wilson interpreted this amendment as having a dual purpose: (1) to provide protection to temperance associations promoting the implementation of state prohibition laws and (2) to provide broad power to the states in the execution of their police powers. White, *supra* at 482. Senator Sherman endorsed the bill despite his realization that it had a broader potential for application than was realized by Wilson, its sponsor. The Wilson amendment passed in its original committee but was later eliminated when the bill was reviewed by another Senate committee. It is possible to argue predicated upon these facts, that Congress either intended to exempt state action or deliberately avoided creating the exemption. Either Congress considered the amendment superfluous and therefore did not burden the already complicated act with unnecessary sections, or the committee rejected the notion of state exemptions and Cong-

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. The Sherman Act makes no mention of the State as such, and gives no hint that it was intended to restrain state action or official action directed by a state.[21]

Pursuing this rationale to its logical conclusion, Stone effectively vitiated the preemption effect of the Sherman Act with respect to state sanctioned action.

Because the Court decided in effect that the supremacy clause was inapplicable in such circumstances and that state economic regulation is therefore simply outside the scope of the Sherman Act, the important inquiry under *Parker* is whether the contested activity constitutes "state action" in the settling of each case. The Court's standard for this determination was whether the private conduct under attack was "directed,"[22] "commanded,"[23] or "imposed"[24] by the state. Thus, a critical factor in *Parker* was the *mandatory* nature of the California raisin prorate marketing program.[25] The producers' anticompetitive

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ress agreed by not reinstituting the amendment. Rules of construction would usually favor the latter interpretation. In either case, the *Parker* Court neither mentioned the Wilson amendment nor its exclusion from the Act. Rather, the Court interpreted the broad prohibitions of the Act as not being intended by Congress to cover state action.

21. 317 U.S. at 350-51.

22. *Id.* at 350.

23. *Id.* at 352.

24. *Id.*

25. An article recently published on the state action exemption and the effect of the *Cantor* decision is Dorman, *State Action Immunity: A Problem Under Cantor v. Detroit Edison*, 27 CASE W.L. REV. 503 (1977) [hereinafter cited as Dorman]. Dorman discusses the development of the *Parker* doctrine and the changes made by *Cantor*. However, the author reaches significantly different conclusions on a number of important issues from the positions delineated in this Note. References are made to Dorman at the appropriate sections to indicate the contrary conclusions he has reached from those in this Note. Although this author believes that a close analysis of the pertinent cases supports the conclusions arrived at in this Note, reference to Dorman is important as it serves to show that the state action exemption is a complex area in which commentators armed with the same cases and information can arrive at radically different results.

Dorman states that only one thing was clear after the *Parker* decision: that official action taken pursuant to state authoriaztion was exempt from antitrust liability. *Id.* at 506. He concludes that the prorate raisin program could "in no way" be interpreted as state *compulsion*. *Id.* at 508. However, in *Parker* Justice Stone carefully distinguished between activity which was compelled by the state acting as sovereign and activity which was merely authorized. See text accompanying notes 45-54, *infra*.

activity was compelled by state regulatory mandate.[26] Although the regulatory program had substantial input by private parties, the Court concluded:

> [I]t is the state acting through the Commission, which adopts the program and which enforces it with penal sanctions in the execution of a governmental policy. . . . The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application.[27]

The *Parker* opinion does, however, include language that appears to limit the otherwise broad exemption doctrine: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[28] Yet, this language is merely an explicit statement of the distinction the Court had drawn earlier regarding liability under state authorization as contrasted with state compulsion.[29] Most of the Sherman Act discussion established that the Act does not apply to activities compelled by the state acting as sovereign. In its short disclaimer, the Court held that mere authorization, as opposed to state mandate, will not exempt private activity from the Sherman Act.

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26. The *Parker* Court did not consider whether the State legislature ever considered the anticompetitive effects of its statute or whether the state purposefully adopted a state regulation in conflict wih federal anitrust legislation. However, the Court did mention that a significant state benefit was fulfilled by the prorate program: "[T]he adoption of legislative measures to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and . . . is a problem whose solution is peculiarly within the province of the state." 317 U.S. at 367. The Court seemed to indicate that another important factor would therefore be the question of whether a state interest was at stake. Subsequent cases did not analyze this factor. Although it has primarily remained inactive, this contention was part of the *Parker* rationale and as such constitutes a valid issue for judicial consideration in state action cases.

27. 317 U.S. at 352.

28. *Id.* at 351.

29. This language could also be interpreted to be little more than a restatement of the holding in the 1904 case of Northern Securities Co. v. United States, 193 U.S. 197 (1904), in which the Court declared: "[N]othing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition. . . . No State can, by merely creating a corporation, or in any other mode, project its authority into other States . . . so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce." *Id.* at 345-46.

It is therefore unlikely that the *Parker* Court attempted to establish any substantive limitation upon its newly articulated state exemption doctrine. It is more probable, rather, that the Court was emphasizing that a well-established rule of the antitrust laws would remain the outer perimeter of its state action exemption doctrine.

Thus, although the Court employs broad language to create the doctrine, it nonetheless serves notice that unless bona fide "state action" is involved, merely tangential or token state participation will not serve to exempt what is essentially private anticompetitive activity. A party violating the antitrust laws cannot claim an exception based upon the fact that the state has been only technically involved.[30] *Parker* therefore draws a clear distinction between the anticompetitive activity of private parties that is only marginally connected with or passively approved by the state and private activity that is mandated as part of valid state regulation. The former situation subjects the parties to antitrust sanctions; the latter constitutes "state action" under *Parker* and lies behind the shield.

Therefore, the state exemption doctrine inferred from *Parker* has two components. First, the antitrust laws do not apply to the states' own economic activities. Second, private conduct compelled by state economic regulation is likewise exempt from the antitrust laws.

The parameters of the state action exemption have been clarified through interpretation in cases subsequent to *Parker*.[31] Some lower courts have liberally accepted the *Parker* doctrine despite the Supreme Court's repeated statements that the judiciary should not lightly imply exemptions from the antitrust laws.[32] A detailed analysis of the judicial interpretation of *Parker* reveals a certain black letter law character behind the substance of the state action exemption doctrine as it existed prior to the *Cantor* decision. Two aspects of this interpretation particularly require discussion: first, the factors that the courts will

30. This type of technical involvement was the situation in *Northern Securities* where the defendants claimed an immunity because they had used the state incorporation process and the state had not complained of the questionable activities. *Id.* at 344-45.

31. There is no general concurrence on the limits of the *Parker* doctrine. As the Fifth Circuit stated in Woods Exploration & Pro. Co. v. Aluminum Co., 438 F.2d 1286, 1294 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972): "The concept of state action is not susceptible to rigid, bright-line rules. Each case must be considered on its own facts in order to determine whether or not the anticompetitive consequence is truly the action of the state." There are definite limits, however, that have become part of the state action exemption doctrine. This Note defines the limits and preconditions which subsequent decisions have formulated for the *Parker* doctrine. See text accompanying notes 31-62, *infra.* While some courts have expanded the exemption's applicability and while others have restricted it, the law on the *Parker* doctrine has emerged as surprisingly uniform.

32. *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. First City Nat'l Bank, 386 U.S. 361, 368 (1967); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 217-18 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963); California v. FPC, 369 U.S. 482, 485 (1962). *See also* Note, *The Antitrust Immunity Doctrine and United States v. National Association of Securities Dealers: Stepping on Otter Tail,* 28 HASTINGS L.J. 387 (1976).

consider in determining whether the state action exemption will apply and second, the scope of any applicable exemption.

A court, engaging in the first aspect of the interpretation, determines whether an activity constitutes *Parker*-standard "state action" so that it is exempt from the application of the federal antitrust laws. The court's determination depends on four major factors:[33] (1) independent state participants must have adequately supervised the regulatory policy; (2) the appropriate state mechanism must have actively supervised and regulated the private party; (3) the enabling legislation must show a clear purpose to displace the antitrust laws in the pursuit of a specific state objective; and (4) even if the statute or the state agency directive only authorizes anticompetitive means, the appropriate state mechanism must compel the anticompetitive activity.

If the courts determine that the activity in question meets the criteria above, the state action exemption will be applied, and the exemption's scope then becomes the all important consideration. The scope of the *Parker* doctrine, as expanded by subsequent cases, extends to the state, its agents and officials and the private parties involved in an anticompetitive regulatory scheme. This exemption is referred to as "umbrella immunity."

The following analysis is a detailed view of the major cases formulating the four factors that limit the substance and scope of the *Parker* doctrine. Such analysis is the foundation for surveying the extent to which *Cantor* is a significant alteration in the traditional state action exemption.

Independent State Participant Supervision

The rationale that state officials must be active in supervising the appropriate state regulatory policy was first articulated in *Asheville Tobacco Board of Trade, Inc. v. FTC.*[34] The North Carolina legislature had enacted a statute permitting tobacco warehousemen to form local boards of trade with the authority to enact rules to provide for more efficient tobacco handling and sale.[35] Eleven warehousemen operating in the city of Asheville accordingly formed such a board and passed rules, sharply curtailing the number of hours in a day when tobacco could be sold, prohibiting new warehouse construction, and

33. Many courts work with these factors as "preconditions." However, because some courts do not include all of the elements in reaching their conclusions, the more generalized term "factor" is utilized in text.

34. 263 F.2d 502 (4th Cir. 1959). For a case which is very similar to *Asheville* in facts and results, *see* Bale v. Glasgow Tobacco Bd. of Trade, Inc., 339 F.2d 281 (6th Cir. 1964). *See also* Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971), *aff'g* 317 F. Supp. 247 (D.V.I. 1970).

35. N.C. Gen. Stat. §§ 106-465 (1965).

generally otherwise restricting competition. When plaintiff sued in state court, the North Carolina Supreme Court upheld the tobacco board rules as both reasonable[36] and consistent with valid state legislation.[37] Plaintiff then lodged a complaint with the FTC, which issued a cease and desist order, declaring the rules to be an unreasonable restraint of trade.

The tobacco board's appeal, based upon the *Parker* exemption, was rejected by the Fourth Circuit, which held that the action of the board did not constitute state action. The board's rules were, according to the court, merely private action masquerading as that of the state.[38] The court added that to come within the *Parker* doctrine, a state program or regulatory agency must be supervised by independent state officials.[39]

The *Asheville* court was concerned that the members of the tobacco board were competitors who served inherently conflicting interests. Commenting on the *Parker* doctrine, the court utilized language which would significantly extend the power of states to regulate:

> [T]he teaching of *Parker v. Brown* is that the antitrust laws are directed against individual and not state action. When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control or, in a proper case, to eliminate competition therein.[40]

36. Day v. Asheville Tobacco Bd. of Trade Inc., 242 N.C. 136, 144, 87 S.E.2d 18, 24 (1955).

37. *Id.*

38. 263 F.2d at 509.

39. *Id.* at 509-10.

40. *Id.* at 509. A number of subsequent cases reinforced the theory underlying *Asheville.* In Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 251 (4th Cir. 1971), the court stated: "To find shelter under *Parker,* the acts complained of must be the result of state action, either by state officials or by private individuals 'under the active supervision' of the state, *Allstate Insurance Company v. Lanier,* 361 F.2d 870, 872 (4th Cir. 1966), although proposals may originate privately if their execution depends on state regulation or actual state implementation."

The Fifth Circuit in Woods Exploration & Producing Co. v. Alumnium Co., 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972), stated: "[I]t is not every governmental act that points a path to an antitrust shelter. We reject 'the facile conclusion that action by any public official automatically confers exemption.'" [Citations omitted. The Court then quoted extensively from *Asheville.*] *Id.* at 1294.

The Supreme Court had the opportunity to comment on the issue in Gibson v. Berryhill, 411 U.S. 564 (1973). Licensed optometrists employed by Lee Optical Company who were not members of the Alabama Optometric Association were charged by the Association with unprofessional conduct within the scope of the state optometry statute. One of the critical issues in the case became the question of the objectivity of the Alabama Board of Optometry, with which the origianl complaint had been filed. The Board was composed entirely of Association members: the defendants charged that the Board was biased and hence should not have a role in the proceedings. The

Bona Fide Regulation

In order to constitute valid governmental state action, the function of the regulatory process must go beyond that of a rubber stamp for the policy whims of the regulated private parties. Even with the presence of adequate independent state supervision, a regulatory agency may fall short of its obligation in this regard.

The Fifth Circuit addressed this criterion in *Woods Exploration & Producing Co. v. Aluminum Co.*[41] In *Woods,* both the plaintiff and the defendant were natural gas producers in the same area, and both were subject to the same regulatory agency, empowered to set maximum production quotas for each producer in the field. These quotas were based upon the various producers' forecasts of the volume of gas they estimated they would be marketing from their wells. The commission totaled these forecasts and then applied an allocation formula, weighted to favor those producers with small gas reserves. The defendants generally had larger reserves, and the plaintiff charged them with violating the Sherman Act by filing purposefully underestimated forecasts in order to reduce the quota given the plaintiff.

The defendants predicated their defense upon the *Parker* doctrine, alleging that once their forecasts became part of the commission's regulatory order, they constituted state action. The Fifth Circuit denied the defense, stating that the defendant had been the "real decisionmaker" because the commission had done no more than to base its order upon the defendants' falsified forecasts. The court stated:

> [I]n the case at hand there is an allegation that the Commission's production allowable order rested upon false facts adduced by the defendants. There was, moreover, no opportunity for meaningful supervision or verification. . . . Hence, defendants' conduct here can in no way be said to have become merged with the

Supreme Court concluded "[t]he District Court determined that the aim of the Board was to revoke the licenses of all optometrists in the State who were employed by business corporations such as Lee Optical, and that these optometrists accounted for nearly half of all the optometrists practicing in Alabama. Because the Board of Optometry was composed solely of optometrists in private practice for their own account, the District Court concluded that success in the Board's efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified from hearing the charges filed . . . . [W]e affirm . . . . It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. . . . It has also come to be the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.'" *Id.* at 578-79.

See also Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense,* 66 MICH. L. REV. 333, 340-43 (1967).

41. 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972).

action of the state since the Commission neither was the real decision maker nor would have intended its order to be based on false facts.[42]

Legislative Authorization of Anticompetitive Means

When the state creates a regulatory agency, most courts have required that the statute generally authorize anticompetitive activity if the agency is to come within the scope of the state action exemption.

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42. 438 F.2d at 1295. *Accord,* Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (1971) where the Fourth Circuit concluded: "If the exemption is to be applied to a regulated industry, such as a state utility, then it can extend only to those activities which fall under state supervision. . . . The regulatory agency must be a creature of the state and not one whose actviities are governed by private agreement without any real state control." *Id.* at 251 (citation omitted). Similarly in George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d (1st Cir. 1970), *cert. denied,* 400 U.S. 850 (1970), the First Circuit stated: "An anticompetitive practice may receive only the most cursory inspection by public officials . . . or public officials may approve conduct without consideration or awareness of its anticompetitive aspects. . . . The issue in such cases is not whether the action was in form 'governmental' but *whether the real decision makers were public officials or private businessmen.*" *Id.* at 33 n.8 (citations omitted) (emphasis added).

See Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971). In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), a foreign action case, the Supreme Court predicated its denial of the *Parker* exemption upon the fact that there was no evidence that the government had actively approved the conduct of the regulated party.

In Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), the Court, in dicta, presented analysis which concerns itself with the issue of bona fide agency regulation: "[T]he Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where a restraint upon trade or monopolization is the result of *valid governmental action,* as opposed to private action, no violation of the Act can be made out." *Id.* at 135-36 (citation omitted) (emphasis added). It is the concept of "valid governmental action" which the courts must attempt to define as one of the factors comprising the state action exemption. It is important to note that the broad statement from *Noerr* may no longer be simply dicta. In California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972), Justice Stewart, in his concurring opinion, said that the *Noerr* Court had "held" that the lobbying immunity "was a corollary of our decisions in *Rock Royal* . . . and *Parker* . . . [which held] that when a monopoly or restraint of trade is the result of valid governmental action, there cannot be an antitrust violation." *Id.* at 516 n.3 (citations omitted). This language tends to reinforce the concept that the activity of the state agency must constitute bona fide regulation and not just automatic approval.

In Allstate Ins. Co. v. Lanier, D.C., 361 F.2d 870 (4th Cir. 1966), *cert. denied,* 385 U.S. 930 (1966), the state statute not only created the North Carolina Automobile Rate Administrative Office and provided for its regulation by the State Insurance Commissioner but also expressly authorized price fixing. This is a rare case because of the express anticompetitive sanction; most other statutes do not, and need not, contain such specific provisions.

Although it is not necessary under this criterion that the statute specifically list any and all anticompetitive actions that the agency could conceivably order, the legislation nonetheless must be sufficiently particular so that it can be interpreted to permit the challenged anticompetitive practices in the fulfillment of the state regulatory policy. The courts have generally been lenient in upholding pervasive statutes, worded in broad terms, to satisfy this requirement.

The proposition was treated at length by the First Circuit in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*[43] In that case a swimming pool builder tried to convince an architect hired by a school board to adopt bid specifications for a proposed pool to which competing builders could not conform. The defendant contractor argued that he could not be held liable for inducing an agent of the school board to undertake valid, albeit anticompetitive, state action within the meaning of *Parker*. The district court held that the defendant was not covered by the *Parker* exemption. The government agency itself was the only proper decisionmaker under the relevant competitive bidding statute, and the defendant could not usurp its power by inducing the board's agent to adopt bid specifications only the defendant could satisfy. The court in applying *Parker* reasoned that "valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation."[44]

43. 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

44. *Id.* at 30. *See also* Alabama Power Co. v. Alabama Elec. Coop., 394 F.2d 672 (5th Cir. 1968); Independent Taxicab Operators' Ass'n v. Yellow Cab Co., 278 F. Supp. 979 (N.D. Cal. 1968); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass. 1957), *aff'd per curiam*, 242 F.2d 758 (1st Cir. 1957).

The *Whitten* rationale had first been articulated several years earlier in Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109 (W.D. Pa. 1969), in which the district court stated: "[W]here a 'state action' exclusion from the scope of the Sherman Act has been sanctioned by the courts, a particular pattern emerges from the statute under which such action is taken. Not only does the legislature create the entity involved or endow it with governmental character, but it also directs and authorizes that entity by means of the same statute to utilize anticompetitive means to achieve a specific governmental purpose. For example, in *Parker v. Brown* . . . the California legislature not only created raisin districts but authorized them to limit production artificially in order to correct adverse market conditions. Such behavior, if manifested without government direction, would be contrary to federal antitrust legislation." *Id.* at 1111-12 (citations omitted). *Accord.* Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970), where the court concluded: "[I]t appears that the proposition is settled that the antitrust laws do not apply to state government or activities undertaken pursuant to legislative mandate. . . . [T]he antitrust laws do not apply, whether the operation is labeled proprietary or governmental. . . . We deem it well settled that when a state announces a public policy against free competition in an industry essential to it, state control and regulation of that industry,

By thus requiring that anticompetitive conduct be expressly authorized by the enabling legislation, the courts have created an important factor in determining whether there is state action for purposes of a *Parker* exemption. However, the courts do not require the specific statutory intent which must be evidenced as part of the federal immunity cases. Therefore, this requirement of the state action test has been relatively simple to satisfy. The legislature must, in effect, merely decide that the state agency can legitimately enforce public policies which it determines to be ultimately more beneficial than that of free competition.

Agency Compulsion

Clearly one of the critical factors in *Parker* was the mandatory nature of the California legislation: a raisin producer who wanted to market his crop was compelled to adhere to the terms of the prorate program.[45] Numerous courts which have since considered claims for state action exemption have accordingly placed great emphasis upon whether the anticompetitive activity at issue was thus compelled by the state agency or whether it was merely authorized. The criterion goes beyond the threshold issue of whether the anticompetitive conduct falls within the scope of a state law. Even if the statute does in fact authorize the conduct, the courts nonetheless generally refuse to recognize an exemption unless the appropriate state agency has also utilized its statutory authority to compel anticompetitive behavior.

A recent United States Supreme Court statement in this regard

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even to the extent of eliminating competition, is permissible." *Id.* at 135, 137. *See* E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52, 55 (1st Cir.), *cert. denied,* 385 U.S. 947 (1966); Schenley Indus. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872 (D.N.J. 1967) (defendants improperly sought to invoke a state statute requiring independent vertical price fixing to protect an alleged horizontal price fixing scheme). For a restrictive interpretation of a legislative statute, *see* Marnell v. United Parcel Serv., Inc., 260 F. Supp. 391 (N.D. Cal. 1966), wherein the court refused to find the necessary legislative authorization when the statute involved was "one of general supervision rather than one of specific direction." *Id.* at 409. *See generally,* Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972), a federal action immunity case where the court not only refused to find any statutory authorization but suggested in dicta, *inter alia,* that the proper inquiry in state action cases is "to what extent . . . the state action [is] permissible as not contravening the federal antitrust laws. . . . " *Id.* at 935.

Finally, it should be noted that the Court in *Parker* did not undertake an inquiry to determine whether California considered the anticompetitive ramifications of its legislation and thereby made a deliberate effort to substitute state regulation for the federal antitrust laws. This factor of authorization granted by the enabling statute has, therefore, exclusively been developed through subsequent court decisions.

45. 317 U.S. 341, 347 (1943).

is *Goldfarb v. Virginia State Bar*,[46] in which the Court faced the issue of whether price fixing practices by the defendants were "required" by the state. A minimum fee schedule for real estate title searches had been published by the defendant Fairfax County Bar Association and had been enforced by the defendant Virginia State Bar. Plaintiffs sought injunctive relief and damages, charging that the minimum fee schedule constituted price fixing in violation of the Sherman Act. The defendant associations contended that they were exempt under *Parker*.

The Supreme Court reversed a court of appeals decision for the defendants, holding that neither the Virginia Supreme Court nor any Virginia statute required the activity in question.[47] Although the defendant raised the issue of the State Bar's power to publish ethical opinions as a means of enforcing the fee schedules, the Court found that this power did not constitute state supreme court approval[48] and consequently state compulsion. The Court summarized the rationale underlying its opinion in its statement that "it is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather anticompetitive activities must be compelled by direction of the State acting as sovereign."[49] *Goldfarb* is essentially a reinforcement of the doctrine of compulsion which has been a critical factor in cases since *Parker*.[50]

46. 421 U.S. 773 (1975).

47. *Id.* at 790.

48. *Id.* at 791.

49. *Id.* *Goldfarb* explicitly stated that compulsion had always been an integral part of the state action test. However, Dorman's conclusion that *Goldfarb* is a significant restriction of the state action test is partially based upon his interpretation of *Parker*. Dorman, *supra* note 25, at 508. Because he views *Parker* as requiring mere authorization in order to invoke the exemption, he therefore views the language in *Goldfarb* concerning compulsion to be a significant restriction. Yet, as the above analysis of *Parker* and subsequent cases evidenced, compulsion had always been an inherent part of the state action test, and *Goldfarb* merely stated this as an observation.

50. An earlier Supreme Court decision which is concerned with the same issue is Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). *Schwegmann* centered around the 1937 Miller-Tydings Amendment to the Sherman Act, which provided for an antitrust exemption for state fair trade laws. Louisiana permitted fair trade agreements and declared its nonsignor clauses enforceable. These clauses permitted the enforcement of resale price maintenance agreements between wholesalers and retailers with the signature of just one retailer. Two distributors sought to enjoin a nonsigning retailer for selling below the fair trade contract price, and the retailer in turn predicated his defense upon the Sherman Act. In a plurality opinion written by Justice Douglas, the Court held that the nonsignor clauses were prohibited by the Sherman Act to the extent that the arrangements were not expressly exempted by the Miller-Tydings Amendment. *Id.* at 386-87.

There was no state compulsion from which the Court could apply the *Parker* exemption. The anticompetitive conduct (use of the nonsignor clauses) was initiated at the wholesale level where the minimum resale price agreement was first formulated. At this functional level, the state's position was both neutral and uninvolved. Lou-

There is a minority position on the importance of the compulsion factor. Some courts, commencing with *Washington Gas Light Co. v. Virginia Electric & Power Co.*,[51] have held that state compulsion need not be shown and that authorization alone will trigger the *Parker* exemption. In *Washington Gas*, the defendant electric company had instituted a program under which it waived fees for installing power lines and gave rebates to residential developers who agreed to install electric appliances and utilities. The Washington Gas Company was losing business as a result of this program and brought suit charging both an illegal tying arrangement and an illegal exclusive dealing program. The defendant electric company, relying on *Parker*, asserted that the State Corporation Commission (SCC) had the exclusive statutory authority to supervise public utilities and to prohibit anticompetitive activities. The SCC had in fact neither investigated, approved, nor disapproved the practices at issue. The court nonetheless held that because the SCC could have prevented the activities in question, its failure to do so constituted implied consent sufficient to justify a *Parker* exemption. The Fourth Circuit thus extended the state action exemption doctrine to cover private anticompetitive action neither compelled nor approved by the state and thereby introduced a new factor into the *Parker* calculus: *potential* state regulatory control. The court stated that it was reasonable to assume that silence by the regulatory commission could be inferred to be commission approval. Because the commission had the power to stop the activity, and did not use that power, the court assumed that the commission had no objection.[52]

The practices under attack in *Washington Gas* were not required by either the state or the regulatory agency; the SCC was not the ultimate decisionmaker in this case; the defendant had full discretion in establishing the rate practices in question; and finally the defendant had a past record of participating in anticompetitive schemes,[53] yet

isiana law merely permitted wholesale suppliers to integrate nonsignor clauses into their contracts; there was no state compulsion to include such clauses as a condition of doing business in the state.

There is another possible explanation of the *Schwegmann* result which is not based upon the compulsion doctrine. This latter view contends that the state statute exceeded the permissible exemption of the Miller-Tydings Amendment from the antitrust laws. In essence, that federal antitrust law superseded the state regulatory statute and functions.

51. 438 F.2d 248 (4th Cir. 1971); *see* Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062, *rehearing denied*, 405 U.S. 969 (1972); Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966).

52. 438 F.2d at 252.

53. The defendant had proposed discount plans for three consecutive years; these were denied by the SCC. In addition, various promotional schemes which were

despite this weak factual basis the court granted an exemption. Therefore, *Washington Gas* is perhaps best regarded as a maverick extension of the state action exemption doctrine. Numerous courts presented with facts which could have embraced the *Washington Gas* rationale have not adopted its reasoning.[54] The majority of courts apparently will continue to require that the anticompetitive activity be compelled, not merely authorized, by the state agency.[55]

Scope of the Exemption

When a court determines that the foregoing four criteria are satisfied and that the exemption therefore applies, the court must then determine the permissible boundaries delineating its application. The scope of the *Parker* doctrine has been judicially developed to exempt

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similar to those involved in this case were also rejected by the SCC after a full investigation as not being in the public interest. The defendant accomplished its desired results, which had previously been rejected by the SCC, by making minor modifications in instituting the programs. However, there is little reason to infer that the agency had now changed its opinion and was approving this activity through its silence. 438 F.2d at 250.

54. For cases which articulate the compulsion standard, as opposed to the *Washington Gas* rationale, see Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971); Macom Prod. Corp. v. American Tel. & Tel. Co., 359 F. Supp. 973 (C.D. Cal. 1973); Marnell v. United Parcel Serv., 260 F. Supp. 391 (N.D. Cal. 1966).

In the federal courts it has long been held that unexercised regulatory power does not grant an exemption from the antitrust laws to those potentially regulated. *See, e.g.*, Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960); United States v. Borden Co., 308 U.S. 188 (1939). *See also* International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153, 1203 n.129 (D. Hawaii 1972) (*Washington Gas* "an unwarranted hyperextension of *Parker*"); *see generally* Note, *Noerr-Pennington and Parker Defenses Inapplicable to Filing of False Information with State Regulatory Commissions*, 46 TUL. L. REV. 526, 530 n.29 (1972); Note, *State-Regulated Industries — Washington Gas Light Co. v. Virginia Electric & Power Co.*, 13 WM. & MARY L. REV. 229, 230-31 (1971).

55. A serious shortcoming of the traditional *Parker* test had been its intermingling of exemption and preemption questions; they are and should be separate and distinct issues. *Cantor*, in section III of the opinion, tries to draw the distinctions between these two different tests. 428 U.S. at 592-98. Interestingly, Dorman concludes that the *Cantor* Court has accomplished exactly the opposite result when he states, "One of the most dramatic facets of *Cantor* has been the infusion of preemption concepts directly into the immunity concepts." Dorman *supra*, note 25, at 513. Even if this were a correct appraisal of *Cantor*, it would fall short of this statement because numerous cases interpreting *Parker* had liberally intermingled the concepts of immunity and preemption. Rather, the dramatic facet of the case occurs because the Court is attempting to address these two issues on independent bases. The fact that the Court talks of both issues within the same section of the opinion does not support the interpretation of a unification of these two concepts.

the state and its agencies and employees that originate or participate in anticompetitive regulatory programs, and the regulated private parties.

State Exemption

The *Parker* Court expressly stated that the Sherman Act was never intended to apply to the states:[56]

> There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history. . . .
>
> . . . [T]he California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a *prohibition of individual and not* state action.[57]

Subsequent cases, including *Cantor,* have reinforced this aspect of the exemption's scope.[58]

The *Parker* Court also extended the scope of the exemption to cover agents of the state. In discussing the validity of the California prorate program under the Sherman Act, Chief Justice Stone declared that there was no indication in the language of the Sherman Act that was intended to be a restraint upon the states.[59] The Court included regulatory agencies created by the legislature and found such agencies to be comprised of their "officers" and "agents." This interpretation brings state agencies within the ambit of the state action exemption.[60]

Private Party Exemption

Private parties were not sued as such in *Parker,* but an exemption for private parties was implicit in the Court's use of the term "state action."[61] While the *Parker* Court did not expressly define the term "state action," subsequent cases have interpreted the term to include regulated private parties.[62]

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56. 317 U.S. 341, 350-52 (1943).

57. *Id.* at 351-52 (citations omitted) (emphasis added).

58. *See, e.g.,* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir.), *cert. denied,* 385 U.S. 930 (1966).

59. See note 21 *supra.*

60. *Accord,* Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970); E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied,* 385 U.S. 947 (1966).

61. Rahl, *Resale Price Maintenance, State Action, and the Antitrust Laws: Effect of Schwegmann Brothers v. Calvert Distillers Corp.,* 46 NW. U.L. REV. 349, 364-65 (1951).

62. *See, e.g.,* Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971), *cert. denied,* 404 U.S. 1062 (1972); Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969); E. W. Wiggins Airways,

Summary

In order to decide whether to exempt challenged activity from the federal antitrust laws under the state action exemption doctrine, the courts will consider some or all of the following factors: (1) whether independent state participants, as opposed to private parties with vested interests, are adequately supervising the regulatory process; (2) whether there is active agency regulation; (3) whether the enabling legislation evidences a purpose to displace the antitrust laws in the pursuit of a specific state objective; and (4) whether the agency has compelled the questioned activity. If the above considerations are satisfied by the facts of a given case, the court will generally extend the state action exemption to the state, its agents, its employees, and the regulated private parties who have been sued under the antitrust laws.

This complex framework has been profoundly affected by the Supreme Court's opinion in *Cantor v. Detroit Edison Co.*[63] *Cantor* assumes special importance because numerous statements in the decision make drastic departures from the well-established principles of the *Parker* doctrine.

Cantor v. Detroit Edison Co.

The defendant electric company in *Cantor* supplied electricity for nearly five million people in southeastern Michigan and had instituted a program to provide light bulbs to its customers without additional charge.[64] In 1972, under the program the defendant had supplied

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Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied,* 385 U.S. 947 (1966). *See also* Heath v. Aspen Skiing Corp., 325 F. Supp. 223, 232 (D. Colo. 1971), where the court applied the state exemption rationale, including the "valid government action" statement, to federal governmental action.

Private parties will not be covered by the *Parker* exemption if they are not part of activities which comprise state action, and hence the regulated private parties are open to antitrust liability. Woods Exploration & Producing Co. v. Aluminum Co., 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972) (use of false facts); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied,* 400 U.S. 850 (1970) (misrepresentation of information).

63. 428 U.S. 579 (1976).

64. Under this program, new residential customers were provided with bulbs in unlimited quantities for their permanent fixtures. Thereafter, the defendant replaced bulbs in proportion to the residential customer's estimated consumption of electricity. The customer did not pay any charge for such replacement bulbs but usually turned in any burned out bulbs in order to obtain new ones. The defendant supplied customers with nearly 50% of the most frequently used standard light bulbs. The defendant did not distribute fluorescent lights or bulbs of high intensity lamps. If these varieties of bulbs were included, the defendant's share of the relative market would be approximately twenty-three percent. *Id.* at 582-83.

residential users[65] with 18,564,381 bulbs at a cost of $2,835,000;[66] the additional expense occasioned had been included in the company's annual service accounting. Technically, no profit had been realized from the program, the primary purpose of which was simply to increase electricity consumption.[67] This program had originated in 1886, prior to state electric utility regulation.[68] In 1916, the Michigan Public Service Commission first gave its approval to the defendant's utilities policy, which included the bulb program. Since that date, periodic commission approval of the utility's general tariff proposals had implied commission approval of the free bulb program as well. Once a tariff had been approved by the commission, the defendant was bound to continue its appended bulb program at least until the next tariff review.[69]

The owner of a drug store that sold light bulbs brought an antitrust action charging that the defendant's free bulb program violated the antitrust laws by injuring him in his business. The defendant attempted to invoke the *Parker* exemption, asserting that its bulb program was wholly a creature of state regulation. The district court granted summary judgment for the defendant,[70] and the court of appeals affirmed.[71] However, the United States Supreme Court reversed, holding that is is not inconsistent with *Parker* to require that a pub-

65. At the time the suit was filed, mainly residential users were being serviced under this program. In 1964 the state commission had approved the defendant's decision to eliminate the program for large commercial customers. There appeared to be less interest for the program among the larger commercial customers because they primarily utilized large quantities of fluorescent lighting. *Id.* at 583.

66. From this amount, $2,363,328 was paid to the three primary manufacturers of bulbs from whom the defendant purchased. The remaining $471,672 represented the overhead costs in administering the program on a continual basis. *Id.*

67. *Id.* at 583-84.

68. *Id.* at 583. *See* P.A. 1909, No. 106, §§ 1-9 in 26 MICH. COMP. LAWS ANN. §§ 460.551-460.559. The defendant's brief stated that the Commission's function is to regulate the " 'furnishing . . . [of] electricity for the production of light, heat or power . . . . ' " Brief for Respondent at 11, *quoted in* 428 U.S. at 584.

69. Dorman reaches the conclusion that Detroit Edison's conduct was required by the state; he states that the traditional *Parker* exemption was not granted because the utility had primarily initiated the regulatory program. Dorman, *supra* note 25, at 516. It should be noted, however, that the state merely authorized the continued use of a program which had been instituted by Detroit Edison prior to the establishment of the regulatory commission. It is arguable that this form of rubber stamping would not have satisfied the compulsion standards under the traditional *Parker* analysis. The Michigan regulatory commission never held full hearings on the merits of the bulb program. The incidental approval of the bulb program, as a result of the commission's approval of the entire tariff proposals, did not amount to state-mandated activity.

70. 392 F. Supp. 1110 (E.D. Mich. 1974).

71. 513 F.2d 630 (6th Cir. 1975).

lic utility comply both with state regulations and with the federal antitrust laws.[72]

The *Cantor* decision is divided into four sections. Section I is a recitation of the facts. In section II, a plurality of the Court confines *Parker* to its facts as an exemption only of the state and not of regulated private parties. Then section III discusses the possible rationales which could support an exemption of private parties from the antitrust laws, which should be called a "*Cantor* exemption" because the Court now confines *Parker's* application only to the state. The Court gives two possible justifications which might support such an exemption under the proper fact situation but finds that the *Cantor* case does not offer such facts. The two justifications discused by the Court are essentially the underlying bases long used by lower courts to extend the *Parker* exemption to private parties: first, if a private party is compelled to act by the state, and second, if Congress did not intend the antitrust laws to apply.

At the end of section III the Court declares that the state action test includes a factor that, *according to it*, was always present in the *Parker* doctrine: that the exemption will be granted only to "the minimum extent necessary" to make the regulatory program work. Such "minimum extent" analysis is not unprecedented. Federal courts have employed it as a part of the federal immunity test in deciding whether a federal regulatory program and the federal antitrust laws conflict. In such cases the federal courts will grant an exemption only if it is absolutely necessary to make the regulatory program work and even then only to the "minimum extent necessary." This section of *Cantor* indicates that the state action test should be similar to, if not the same as, the federal immunity test. The use of the federal immunity test affects only the issue of whether a regulatory policy will be preempted by the federal antitrust laws; it does not affect the issue of an exemption for a private party subject to the control of the regulatory program. These issues are mutually exclusive.[73]

72. 428 U.S. at 594.

73. Because Dorman has intermingled the exemption and preemption issues, he does not recognize the institution of a standard that represents the federal immunity test and the minimum extent analysis. Dorman views the language at the end of section III as merely adding to the exemption standard which is being prospectively developed in section III. Dorman, *supra* note 25, at 518. By disregarding the Court's language in this part of the opinion, Dorman has de-emphasized the major current change effected by *Cantor*. This section is the only substantive majority section, and it created only one new element to the state action test. This element deals with the preemption issue of state regulations, and for these questions, *Cantor* indicates that the courts should use tests similar to the federal immunity test and the minimum extent analysis. This is part of the attempt by Justice Stevens to separate the exemption and preemption issues which had been confused in cases prior to *Cantor*.

Finally, in section IV, another plurality section, the Court looks at two reasons which arguably could support an exemption from treble damage liability. The Court tersely rejects the rationales as insufficient.

Thus, the principal opinion in *Cantor* holds: (1) *Parker* does not extend to individual action; (2) yet, there might be some reasons for such an exemption; (3) two possible reasons could support an exemption, but neither is found in the *Cantor* facts; and (4) two reasons that the Court examined will not support immunity from treble damages. Within the discussion of possible reasons for an exemption the Court suggests, in dictum, that if such a private exemption is adopted by the Court in the future, it will include the federal balancing approach and the minimum extent analysis of the federal immunity test.

What is the effect of *Cantor*? First, *Parker's* scope is narrowed from its traditional exemption of the state and some private parties to exemption limited to the state. Second, *Cantor* recognizes that there may be reasons to establish a judicial exemption for private parties, who are no longer covered by the now modified *Parker* doctrine. Yet the Court declines to apply a new exemption to the facts in *Cantor*. The Court has abrogated the old exemption without defining a new exemption, wiping the slate clean and freeing itself to write the new exemption with whatever terms it chooses in the future. However, the Court hints that a prospective exemption for private parties will resemble the federal immunity test, including the limitation that the exemption apply only to the minimum extent necessary to make the regulatory act work. This exemption seems narrower than the one which had been recognized in *Parker* cases.

While each section of the opinion will be analyzed in detail, it is important to note that two Justices did not join in section II, the confinement of *Parker*, and in section IV, the outright rejection of two possible reasons for treble damage immunity. Literally, this lack of a constant majority means that the traditional *Parker* exemption is not firmly abrogated because the section of *Cantor* purporting to do so commanded only a plurality. Yet the next section sketched new rules for the exemption of private parties and garnered six votes. Whether the case is treated as a modification of the traditional *Parker* exemption or as preparation for a new *Cantor* exemption, it is an omen of new rules to come. This Note will examine how much latitude the Court has given itself and what signposts it has set up in an effort to guide the shape of these new rules.

Although sections of the opinion commanded only a plurality, the momentum of the Court toward creation of new rules is demonstrated by the minor differences of the concurring opinions. The Chief Justice did not join in these plurality sections for what appears to be his misinterpretation of the principal opinion. Justice Blackmun did not

concur in these sections because of minor disagreements; as will be developed later, he shares the same philosophical viewpoint as the plurality. Both concurring opinions will be analyzed in detail.

The Confinement of Parker

In section II of the opinion,[74] a plurality of the Court adopted the position that *Parker* granted an exemption to the state only. Therefore, private activity pursuant to state regulation should not be afforded the umbrella immunity which has traditionally been granted it since 1943.[75]

The plurality begins by noting that only state officials were sued in *Parker*.[76] Because no private parties were included in the original action, the opinion reasons that any *Parker* language concerning the liability of private individuals was only dicta. Relying upon the briefs submitted in *Parker* by the California Attorney General and the United States Solicitor General, the plurality declares that the issue was limited to whether the state could be liable under the federal antitrust laws and not whether regulated private parties fell within the scope of the Sherman Act.[77] The opinion notes that the narrow holding in *Parker* made it unnecessary for the *Parker* Court to decide whether the antitrust laws applied to private action compelled by the state.[78] The plurality concedes that the term "state action" has been used broadly in civil rights cases to encompass individual action[79] but that this broad

74. 428 U.S. at 585-92.

75. See text accompanying notes 11-26 *supra*.

76. The State Director of Agriculture and a number of state employees were sued in order to stop their enforcement of the California prorate program. 428 U.S. at 585-86.

77. *Id.* at 587-89. The plurality analyzed the briefs submitted by the California Attorney General and the United States Solicitor General in order to demonstrate that *Parker* had not been concerned with umbrella immunity. The plurality adopted the contention of the California Attorney General that Congress never intended to subject a sovereign state to the scope of the Sherman Act. *Id.* at 591. Analysis of the substantive arguments therein, however, reveals that the position actually taken by the California Attorney General was that the California statute in particular was not preempted by the Sherman Act and not that a sovereign state is exempt per se from its application. California argued that the Sherman Act was not intended to preempt state regulation of intrastate commerce.

The plurality opinion contends that the Solicitor General did not at the time take issue with California's first argument and, quoting from the Solictor General's brief, comes to the conclusion that there is therefore a distinction between state action itself and "private action taken pursuant to a state statute permitting or requiring individuals to engage in conduct prohibited by the Sherman Act." The plurality then declares this issue to be the sole one resolved by *Parker*. *Id.* at 588-89.

78. *Id.* at 590.

79. The Court acknowledges that such a broad usage is found in civil rights litigation. *Id.*

meaning was not intended by Justice Stone.[80] Analyzing the thirteen references to state action by Justice Stone in *Parker,* the plurality concludes that the language which Stone employed was carefully selected to cover official action only and not to cover private action compelled or authorized by the state.[81] The plurality completes its discussion in section II by noting that the *Cantor* case is opposite to *Parker* in relation to the type of party being sued. In *Cantor* a public utility was being sued, and no charge was made against any state official; while in *Parker,* state agents were the object of the court action, and there was no claim concerning private parties. As a result the plurality opinion concludes that *Parker* does not control because *Cantor* does not involve the question of the legality of the conduct of the soverign state nor any of its officials.[82]

The plurality has significantly narrowed the scope of the *Parker* doctrine as it had been applied; the effect *Parker* will have in future state action cases has been radically altered as a result. If a regulated private party is sued under the federal antitrust laws, the courts will no longer apply the four *Parker* factors to determine whether an exemption applies because *there is no Parker exemption for private parties.* On the other hand, if the state or its agents are sued, *Parker* automatically applies, and the federal antitrust laws are inapplicable.

Parker, therefore, has been limited to stand for the barren proposition that the Sherman Act was never meant to apply to the states. If the Supreme Court in *Cantor* had concluded its opinion at this point, the realm of state action cases would be clearly defined in terms of nonliability for the state or its agents and potential liability for the regulated private parties; no express statutory exemption nor any judicial exemption would have existed for the benefit of the regulated private parties. However, the Supreme Court did not end its opinion there; instead, the Court suggested the possibility of a new judicial exemption, a *Cantor* exemption, which could apply to regulated private parties.

Rationales for a Private Party Exemption

In section III of the opinion,[83] a majority section, the Supreme Court discusses two possible rationales for the existence of a private party exemption. First, if a private party has done nothing more than obey the command of the sovereign state, it would be "unjust" to hold him liable for an antitrust violation (the state compulsion rationale). Second, if a state regulates an area of the economy, it is possible that

80. *Id.* at 590-91.
81. *Id.* at 591 n.24.
82. *Id.* at 591-92.
83. *Id.* at 592-93.

Congress did not intend to apply the antitrust laws as an "additional, and perhaps conflicting, regulatory mechanism"[84] (the congressional intent rationale). These reasons have been the implicit rationales supporting lower court extensions of *Parker* in the past.

In relation to the state compulsion justification, the courts have considered whether a private party was compelled to undertake the anticompetitive conduct as the result of state mandate; if this were the situation, the exemption would apply. However, if a private party were merely authorized to participate in anticompetitive activity, the *Parker* doctrine would not afford an exemption from federal antitrust liability. The courts had developed a number of factors which served as the basis for determining the degree of state compulsion present in a given set of facts, for example, whether there were independent state officials who had actively regulated and mandated the contested activity.[85]

In regard to the congressional intent justification, the courts often granted an exemption if the enabling legislation for the challenged conduct evidenced an intent to substitute state regulation for open competition.[86] In effect, courts under *Parker* intermingled preemption questions concerning the validity of state regulatory programs as against the federal antitrust laws with the questions relating to the private party exemption. These issues should be kept separate; *Cantor* suggests that this separation is important. The only connection between these issues is that the court cannot grant an exemption greater than the "minimum extent" necessary.[87]

The *Cantor* Court in section II struck down the traditional *Parker* umbrella immunity, which had been based on these two rationales. Then in section III, the Court suggests that a new exemption which is based on the same two rationales may be valid.

First, *Cantor* considers state compulsion, the situation in which the private party merely obeys the command of the state. The Court states that in such cases it would be unacceptable to impose antitrust liability. The Court acknowledges, however, that most cases involve a mixture of state and private decisionmaking and give rise to difficult exemption issues. In this respect the majority states: "The Court has already decided that the state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity."[88] In this sentence *Cantor* adopts the same position which had been developed through two of the *Parker* factors: that the state

84. *Id.* at 592.
85. See text accompanying notes 26-29 *supra.*
86. See text accompanying notes 43-44 *supra.*
87. 428 U.S. at 596-97.
88. *Id.* at 592-93 (citations omitted).

actively regulate and supervise the private party and that in the course of this regulation and supervision, the state compel the private party to undertake anticompetitive activity. However, instead of restating the exemption in traditional *Parker* terminology, the Court substitutes a new factor:

> In each case, notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision.[89]

The majority then applies this standard prospectively to the facts in *Cantor* and finds that the private utility significantly participated in the implementation and continuation of the bulb program and therefore could incur liability. The Court points out that although Detroit Edison could neither maintain nor terminate the program without prior commission approval, the choice to implement the program was "primarily respondent's [Detroit Edison], not the Commission's."[90] The majority noted that the program had been instituted even prior to the existence of the regulatory commission, at the sole discretion of the private utility. Regarding the significant role of the utility, the Court concludes:

> [E]ven though there may be cases in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it, this record discloses no such unfairness.[91]

In the first part of section III the Court offers a reason for creating a new exemption, then establishes a framework to apply the exemption, but decides that the exemption is not supported by the facts of *Cantor*. Because the Court did not exempt Detroit Edison under the state compulsion rationale, a new exemption has not been formally created to fill the vacuum left by the confinement of *Parker*. By preparing the framework, whether the private party exercised sufficient freedom of choice so as to be responsible for the consequences of his decision, *Cantor* had indicated the form of the exemption if and when the Court decides to apply it.[92]

89. *Id.* at 593.

90. *Id.* at 594.

91. *Id.* at 594-95.

92. Another interpretation of the state compulsion rationale is provided by Dorman, who views the State Compulsion rationale as merely the first step in a four-part test which he draws out of the *Cantor* decision. Dorman, *supra* note 25, at 514-15. The basis of this interpretation is the intermingling of the exemption and preemption issues. Dorman therefore concludes that all of these varied issues combine into a "four factor test." Dorman, *supra* note 25, at 520. This analysis appears to be the one that the *Cantor* Court hopes to eliminate. The clear division of Justice Steven's discussion in section III indicates that the State Compulsion rationale is a separate

In the remaining portion of section III, the majority considers the congressional intent justification for exempting regulated private parties. For three distinct reasons, the Court rejects the contention that the antitrust laws should never apply in segments of the economy regulated by state agencies. First, state regulatory policies and the federal antitrust laws do not have necessarily inconsistent standards. Second, even if an inconsistency existed, there is no reason for the federal interests in preserving competition to be subordinated to the state's interest in regulation. Finally, even if Congress did not intend to superimpose the antitrust laws in areas of the economy pervasively regulated by the state, that congressional intent would not prohibit the application of the antitrust laws in an "essentially unregulated area such as the market for electric light bulbs."[93]

To support the point that federal antitrust laws and state regulatory statutes are not necessarily inconsistent, the Court notes numerous examples of economic regulations that do not limit open competition. For example, in the area of public utility regulation, the Court assumes that the private companies will eventually adopt a monopolist position and that state regulatory controls are needed to protect the consumer from monopolistic abuses. The *Cantor* majority finds no inconsistency in a private utility's liability under the antitrust laws insofar as it is participating within the competitive segments of the economy but being exempt from liability when regulated in the use of its natural monopoly powers. Detroit Edison must satisfy the state commission when distributing electricity, but the light bulb program which constitutes participation in a competitive market must satisfy the antitrust laws.[94] *Cantor* could have ended its discussion at this point because the standards were not inconsistent. Instead, the Court completed its discussion of the form a new state action exemption could assume.

Even if the federal antitrust and state regulatory standards were inconsistent, the Court finds no reason automatically to defer to the state regulatory policies. The Court points out that policies adopted by federal regulatory agencies which conflict with the federal antitrust laws do not necessarily prevail over the antitrust laws. Rather, the courts attempt to harmonize the two inconsistent standards. This attempt involves a balancing of the conflicting interests. There is no reason, declares the majority, that state regulatory agencies should be given a broader grant of power than federal agencies. Automatic subordination of federal antitrust laws to conflicting state regulations

basis upon which the Court may create a future exemption. 428 U.S. at 592-95. It is not dependent upon any other factor which the Court develops.

93. 428 U.S. at 595.

94. *Id.* at 596.

would acknowledge a state preemption dectrine more potent than the federal preemption doctrine.[95] However, cases construing the commerce clause preclude a more potent state preemption rule. Therefore, the Court states that if federal agencies must have their regulations balanced against conflicting antitrust standards, the state regulations must be subject to a test at least as strict.

Integral to the federal immunity test is that there can be no exemption unless necessary to make the regulatory policy work "and even then only to the minimum extent necessary."[96] This requirement is employed in federal action cases to indicate that while the regulation may be as broad as is permissible, the exemption will only apply to that portion necessary to make it work. This factor was never part of the traditional *Parker* doctrine. In a general sense, the minimum extent analysis relates to the third factor under *Parker*, that the enabling legislation must show a clear purpose to displace the antitrust laws; courts would sometimes exempt on the basis of only a clear statutory purpose.

However, under the prospective *Cantor* formula, the traditional *Parker* factor would be woefully inadequate. An explicit intent to displace the federal antitrust laws would be meaningless because the state does not possess the power to preempt, at will, federal legislation. Instead, the state statute and interest in regulation would be balanced against the federal antitrust interest in preserving open competition. Additionally, even if the balance weighs in favor of the state regulatory policy, the exemption will only be granted to the minimum extent necessary to ensure that the regulatory program can operate.

Under the traditional *Parker* analysis, a private party was exempt so long as it satisfied the courts that there was state action. The courts never separately considered whether the contested policy was valid in respect to federal preemption questions before considering the issue of a specific exemption for the private parties involved in the particular case. *Cantor* has established a prospective framework that is significantly different from the *Parker* state action doctrine. Under the *Cantor* approach, the courts can separately decide whether the state regulatory program is valid on a preemption basis. For this determination they may employ a balancing of interests as in the federal immunity test. If the courts should invalidate the regulatory program,

95. *Id.* at 596-97. The Court in *Cantor* reinforces this notion that the state preemption doctrine can be no greater than the federal preemption. When some of the courts in the traditional *Parker* cases only looked for the specific purpose in the enabling legislation, they were granting exemptions to state regulatory statutes without even considering the implicit questions of federal antitrust preemption. This approach was giving the states a broader grant of authority to regulate than that which was available to federal agencies.

96. 428 U.S. at 597.

then the private party does not need to follow future state mandates but can instead obey the antitrust laws and avoid liability. If the courts should uphold the state program, then the private party must conform to the state regulations, and there will be no future antitrust liability. As to the question of past liability arising prior to the determination concerning the validity of the statute, the courts must separately consider the state compulsion rationale. If a court should decide to exempt, it must exempt only to the minimum extent necessary to make the statute operate.

Finally, in the discussion of the congressional intent rationale, the Court declares yet another reason why an exemption should not be created for Detroit Edison. Even if Congress did not intend to apply the antitrust laws to areas of the economy already regulated by the state, the application of the antitrust laws to an essentially unregulated area of the economy would still not be prohibited. In *Cantor,* the state had a regulatory policy toward electricity consumption, not to the distribution of light bulbs. As a result, there was no state regulatory policy with which to contrast the antitrust laws. In that situation, the Court concludes that the state interest in regulating electrical consumption will not be impaired by the application of the federal standards to distribution of light bulbs.[97]

What has the Court accomplished in section III? After eliminating the umbrella immunity of *Parker* in section II, the Court in section III has presented reasons that might justify the creation of a new exemption but rejects them on the basis of the specific facts in *Cantor.*

In determining whether a state regulatory policy will exempt private parties there are several considerations. First, if the private party is participating in a sector of the economy that is not regulated, the antitrust laws may apply. Second, if the private party is acting within a regulated segment of the economy, then the courts must determine whether the regulatory scheme conflicts with the antitrust laws. If there is an inconsistency, the courts should balance the competing interests. If the balance falls in favor of the state, the courts should imply a congressional intent to exempt the activity from operation of the federal antitrust laws to the minimum extent necessary to make the scheme work.

Furthermore, if the role of the state is so dominant in the decision-making and the implementation segments of the regulatory scheme that it would be unfair to hold the private party liable, then the activity will be exempted. This rationale for an exemption will apply even if the court should invalidate the regulatory scheme on the basis of balancing state interests versus the antitrust laws. If the scheme is

97. *Id.* at 598.

improper because of the antitrust law's preemption but the court finds that the state compelled a private party to act in an anticompetitive way, the private party may still be exempted from liability.[98]

Rationales for an Exemption from Treble Damages

In section IV of the opinion,[99] the plurality discusses whether violations of the antitrust laws by regulated parties which may lead to "massive treble damage liabilities" should justify an exemption from treble damages. The plurality considers two reasons advanced in support of this position but rejects both arguments, deciding that regulated private parties should be subject to the law of treble damages.

The first reason offered for treble damage immunity arises in circumstances where the chance of violating the antitrust laws is increased as a result of the regulatory process. In *Cantor* the Court states that the regulation merely approved the program; in no way did mere approval increase Detroit Edison's vulnerability to antitrust liability. Detroit Edison implemented the program prior to the establishment of the Michigan regulatory commission, and the commission merely allowed the utility to continue a program which the utility had developed and long conducted. The continuing regulatory approval by the commission did not increase the liability which the utility faced as a result of its own original action.[100]

The second reason offered for treble damage immunity was reliance by the regulated party on an understanding that the contested activity was exempt from antitrust liability. However, the Court adopts a stern position on this point and firmly rejects the argument when it states, "This Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law."[101] Citing *Goldfarb v. Virginia State Bar*,[102] the Court holds that there is not an automatic

98. Dorman concludes that section III creates one test for future state action cases involving regulated private parties. Dorman, *supra* note 25, at 513-16. As discussed in the text, section III actually creates no test for a private party exemption. The Court mentions that there are possible justifications for the creation of a new exemption, but the Court explicitly rejects those justifications when analyzing the specific facts in *Cantor*. Dorman has interpreted section III to mean that a new exemption has already been created. Yet, the language used by the Court indicates that no exemption will exist for private parties until and unless the Court decides to create one in the future. All the Court provides in section III in relation to the issue of the exemption are possible clues as to the approach the Court may adopt in a forthcoming state action case.

99. 408 U.S. at 598-603.

100. *Id.* at 599-600.

101. *Id.* at 600.

102. 421 U.S. 773 (1975).

exemption for compliance with any state regulation. The plurality also cites *Parker* in its most restrictive portion, where Justice Stone wrote, "[A] state does not give immunity to those who violated the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ."[103] By these references, the Court clearly warns regulated parties that there is no exemption from treble damages on the basis of adherence to a state regulatory command. Though in the past some lower courts had liberally interpreted the *Parker* doctrine to grant such immunity,[104] the *Cantor* court indicates that immunity will not be granted on such a basis in the future. Moreover, in *Cantor* the Court utilizes the argument that even the private parties in *Parker* may not have received an exemption if the issue had been litigated:

> [T]he narrow holding in *Parker* concerned only the legality of the conduct of the state officials charged by law with the responsibility for administering California's program. What sort of charge might have been made against the various private persons who engaged in a variety of different activities implementing that program is unknown and unknowable because no such charges were made.[105]

Cantor is the first court openly to question whether *Parker* might have split on the issue of liability, so as to exempt the state officials yet hold the regulated private growers liable. This statement by the *Cantor* plurality reflects the same reasoning as in section II, in which they confined the *Parker* decision to the issue of state liability.

The final portion of section IV gives some indication of the shape of the prospective exemption if the Court creates a new doctrine in the future. The Court states:

> Although it is tempting to try to fashion a rule which would govern the decision of the liability issue and the damage issue in all future cases presenting state action issues, we believe the Court should adhere to its settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies.[106]

The only suggestion by the Court as to the nature of the prospective exemption is, therefore, the references to the federal immunity test in section III, a majority section.

Section IV is a negative portion of the opinion. In it the Court rejects possible justifications for an immunity and does not establish anything affirmative. The plurality considers two reasons which could support a treble damage exemption for regulated parties but rejects

103. 317 U.S. at 351 (1942).
104. See text accompanying notes 51-53 *supra*.
105. 428 U.S. at 601 (citation omitted).
106. *Id.* at 603.

both of them on the basis of the specific facts in *Cantor*. It appears that one of the reasons might sustain an exemption on appropriate facts in a future case; the Court leaves open the door to proof that a private party's vulnerability to antitrust liability was increased by obedience to state regulation. However, the second reason seems rejected out of hand. The Court states it will not exempt from liability even upon proof that the regulated party was led to believe its conduct was immune from antitrust liability.[107]

The Concurring Opinions

Chief Justice Burger concurs in the judgment and in parts I and III of the opinion. In his separate opinion he contends that *Parker* cannot "logically be limited to suits against state officials."[108] Predicating his decision upon the applicability of *Parker*, he notes that the Michigan commission lacked independent regulatory control, that light bulb distribution is an "ancillary" practice of the utility, and that the commission adopted a "neutral" position. Chief Justice Burger approvingly cites section III of the opinion in support of his reasoning.[109] As is evident from the Chief Justice's holding, he is basing his opinion upon traditional *Parker* case law. As far as he is concerned, *Parker* still covers both the state and the regulated private parties. However, in *Cantor* he does not grant the exemption because there is no active regulation or compulsion.

Because he joined in section III, the Chief Justice apparently interprets that section as deciding the case through a traditional *Parker* analysis. Such an interpretation views the four sections of *Cantor* as inherently contradictory. Under this interpretation, section II is an attempt by the plurality to overrule one-half of the scope of the *Parker* doctrine. Chief Justice Burger refuses to join in this confinement of *Parker*. Part III talks in terms of two justifications which have always been the underlying rationales used by lower courts when applying the *Parker* exemption. The Court rejects these justifications based on the facts of *Cantor*. Instead of viewing the Court's discussion in Part III as the creation of a new *Cantor* exemption, Chief Justice Burger views this section as an application of traditional *Parker* doctrine.

107. Dorman speculates that a treble damage immunity has been created, as of *Cantor*, to apply in certain limited cases. Dorman, *supra* note 25, at 518-19. Section IV does utilize language which indicates that the first justification which is discussed (whether the hazards of antitrust liability were enhanced by the regulatory process) might justify treble damage immunity if the correct set of facts ever arose. However, the Court rejects such an immunity on the basis of the *Cantor* facts, and the Court did not create a treble damage immunity precedent that would bind it in future cases.

108. 428 U.S. at 603-04.

109. *Id.* at 604.

Thus the Chief Justice apparently does not believe that he joins in the creation of a prospective *Cantor* exemption in that he has refused to join in the confinement of *Parker*. He interprets the state compulsion and congressional intent discussions as the old factors of *Parker*. Hence, the Court's holding in section III satisfies Burger who bases his decision upon *Parker* analysis.

Chief Justice Burger's concurrence raises two questions. First, why did Burger concur with the federal immunity and minimum extent analysis in section III? Second, why did he disagree with section IV?

In relation to the language in section III, there are two possible explanations. First, the Chief Justice might believe, as the Court stated, that these factors resembling federal immunity and minimum extent analysis had always been an integral part of the state action test. However, this analysis is incorrect as discussed under the state action test above.[110] Second, he might interpret this language as stiffening the showing of the specific intent of the enabling legislation, one of the former *Parker* factors. This view is also wrong, because if the intent factor of *Parker* were rigidified into the federal immunity test and the minimum extent analysis, it would cease to be a *factor* and would instead become an independent rule.

The Chief Justice considers section III as the one in which the Court decides the case; as previously discussed, the Court decided the case in section II when it confined *Parker*. Section III has no effect on the outcome of *Cantor*, but it is a vehicle for charting a new path to replace *Parker*.

In contrast Justice Blackmun in his concurring opinion appears to have only minor differences with the plurality. One of his major purposes in writing a separate opinion is to explain in greater detail the reasons for adoption of a federal balancing test and to advocate that it should be adopted in the *Cantor* decision and not postponed as the plurality has done.

Justice Blackmun begins by stating that state laws which achieve results which are inconsistent with the federal antitrust laws are preempted. He cites *Schwegmann Brothers v. Calvert Distillers Corp.*[111] and *Northern Securities v. United States*[112] for the proposition that inconsistent state laws in those cases were preempted by the Sherman Act. Blackmun's argument on this point is summarized as follows:

> [S]ome degree of state-law pre-emption is implicit in the most fundamental operation of the Sherman Act . . . . [T]here has never been any doubt that if [state-sanctioned anticompetitive] combinations offend the Sherman Act, they are illegal, and state

110. See text accompanying notes 5-27 *supra*.
111. 428 U.S. at 606 (citing 341 U.S. 384 (1951)).
112. 428 U.S. at 606 (citing 193 U.S. 197 (1904)).

> laws to that extent are overriden. Congress itself has given support to the view that inconsistent state laws are pre-empted by the Sherman Act.[113]

Justice Blackmun views the difficult issue to be determining *which* laws are inconsistent and, of those, which are to be preempted in total or in part. To decide these issues he advocates a balancing approach which parallels that utilized by federal courts in antitrust immunity cases:

> I would apply at least for now, a rule of reason, taking it as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits . . . .
>
> . . . .
>
> . . . The balancing of harm and benefit is, in general, a process with which federal courts are well acquainted . . . .[114]

This approach is essentially the process which federal courts consider when balancing the harms and benefits of a federal regulation against those of the antitrust laws. Blackmun does not talk in terms of the "minimum extent necessary," and therefore it is not discernible whether he favors adoption of all of the federal immunity formula or whether he just advocates a straight balancing approach. Applying his balancing test to the facts in *Cantor*, Blackmun decides that the potential harms of the utility's tie-in arrangement far outweigh the possible benefits.[115]

Justice Blackmun does not join section II and the confinement of *Parker* because, as he states in a footnote, he believes that the contested activity in *Parker* was valid and would have created an exemption for the private growers if they had been sued.[116] One way to recognize a *Parker* exemption for both the state and private parties and simultaneously advocate a balancing approach for state action cases is to consider the balancing test a fifth and controlling factor in the state action test. For instance, a court would still have to go through the traditional *Parker* analysis to decide if there was state action. If the four *Parker* factors were not satisfied, there would be no exemption and no reason to balance the competing interests. If the four factors were satisfied, however, Blackmun would then proceed to balance the interests and conceivably would deny the exemption despite the presence of traditional *Parker* state action.

Both Blackmun and the plurality reach the same result; both demand that the balance of competing interests justify the exemption.

113. 428 U.S. at 607.
114. *Id.* at 610-12.
115. *Id.* at 612.
116. *Id.* at 613-14 n.5.

However, Blackmun would first consider the four *Parker* factors, whereas the plurality discards *Parker* entirely in the context of private parties.

Justice Blackmun agrees with the state compulsion rationale as explained by the Court in the beginning of section III. Because Blackmun advocates the establishment of an exemption as of *Cantor* from treble damages for private parties who act under state mandate, he dissents from section IV.[117] The plurality refused to create such treble damage immunity on the basis of the facts of *Cantor*.

Thus, the concurring opinions complicate an already difficult opinion. The Chief Justice concurs in the judgment; for the wrong reasons he joins in a section which has no effect on the eventual decision. Justice Blackmun advocates the *immediate* adoption of both a balancing approach and a limited treble damage exemption. The plurality considers the adoption of these two approaches to be premature based upon the *Cantor* facts. Blackmun, however, reaches the result under *Parker*.[118]

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117. *Id.* at 614 n.6.

118. Dorman concludes that Justice Blackmun and the plurality are advocating significantly different approaches to the state action issue. Dorman, *supra* note 25, at 520. However, it appears that Justice Blackmun and the plurality have only minor philosophical disagreements and that Blackmun will be the fifth majority vote for the plurality's positions in future state action cases.

The Court has had its first opportunity since *Cantor* to comment upon the state action exemption in its decision in Bates v. State Bar of Arizona, 97 S.Ct. 2691 (1977). In *Bates* the Court was faced with alleged Sherman Act and first amendment violations as the result of a prohibition of advertising by attorneys. The state supreme court as part of its regulation of the Arizona Bar had imposed and enforced the advertising prohibition.

On the first amendment issue, Justice Blackmun authored a majority of five justices who hold that commercial speech, which serves individual and societal interests in assuring informed decisionmaking, is entitled to limited first amendment protection.

However, on the Sherman Act issue, the decision was unanimous as all the justices agree that the activity of the Arizona Bar and the state supreme court constituted state action that was exempt under *Parker*. The Court distinguishes both *Cantor* and *Goldfarb* from the situation in *Bates*.

The *Bates* court notes that there had only been state authorization and not compulsion in *Goldfarb*. In the facts of *Bates*, the Court states that the prohibition on advertising, coupled with a disciplinary rule is a restraint "compelled by direction of the State acting as sovereign." 97 S.Ct. 2697 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975)).

In relation to *Cantor*, the Court draws three distinctions. First, the Court states that the context in which *Cantor* arose is critical. The *Bates* Court says that *Cantor* would have been an entirely different case if the state had been sued, instead of a regulated private party. 97 S.Ct. at 2697. The Court then proceeds to note that the instant suit is against the Arizona Supreme Court and hence against the state itself.

Second, the Court emphasizes that there was no legitimate state interest in the

The Rationale for the Confinement of Parker

A lingering question concerning *Cantor* is why the Court adopted a significant departure from *Parker*. The most likely answer is that the Supreme Court decided that the *Parker* exemption had become a confused doctrine as a result of numerous interpretive cases which had often assumed contradictory stances while simultaneously failing to utilize any established formula or test. The judicial test of state action was so nebulous as to constitute no test in fact. In essence, the Court in *Cantor* decided that it was time for a judicial house cleaning of the state action exemption. However, because of the muddled status of the *Parker* doctrine, the Court decided to talk in terms of a totally new exemption as opposed to a mere modification of *Parker*. If the Court modified *Parker*, the lower courts would still be working with thirty-three years of state action case law in addition to the pronouncements in *Cantor*. Instead, the *Cantor* court confined *Parker* and in this way cleared the slate on regulated private parties. If and

regulation of light bulbs in *Cantor*. In contrast, in *Bates*, the regulation is "at the core of the State's power to protect the public." 97 S.Ct. at 2697-98.

Finally, the Court says that the regulatory program in *Cantor* was initiated by the private utility and that the state commission had merely authorized its continued utilization. However, in *Bates* the Court states that the initiative for the regulatory program came from the state. Also the Court notes that the advertising rules are subject to constant re-examniation by the Arizona Supreme Court. The Court concludes, "Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation . . . . " 97 S.Ct. at 2698.

Despite the three distinctions which the Court draws, *Bates* is not an illuminating decision upon the status of the state action exemption after *Cantor*. The appellants in *Bates* had contended that the federal interest in the antitrust laws should outweigh the state interests in prohibiting advertisements by attorneys. Moreover, the appelants argued that the regulation was not formulated so as to intrude upon the federal interest to the minimum extent necessary. While Justice Blackmun notes the existence of these arguments, he does not proceed to discuss them. It is not clear whether the Court is implicitly utilizing an approach similar to the federal immunity test or whether it is using an unannounced balancing test when considering the conflicting interests.

In *Cantor* the Court appeared concerned with the creation of rules that would apply in future cases. In *Bates* the Court seems to be strictly concerned with a decision upon the facts of the case, and there is no language which creates or modifies the rules of the state action exemption.

In summary, an initial analysis shows that by distinguishing *Cantor*, instead of dealing with it directly, the Court has not clarified the status of the state action exemption.

It is important to note that there are two cases which will afford an opportunity for the Court to deal specifically with *Cantor* in the near future. Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir. 1977), *application for cert. filed*, 45 U.S.L.W. 3779 (May 23, 1977); Lafayette, Louisiana v. Louisiana Power & Light Co., 532 F.2d 431 (5th Cir. 1976), *cert. granted*, 430 U.S. 944 (1977). Both of these cases are concerned with state action issues, and *Cantor* may be the key element in their ultimate disposition.

when the Court decides to create such an exemption, it will be able to do so on its own distinct terms and without the accompanying confusion of *Parker.*

An additional reason for the Court's approach is evidenced in section III. In that portion, the Court separated the discussion of the private party exemption, that is, the state compulsion rationale, from the congressional intent discussion which led into the issues of federal preemption. As discussed above these factors are independent and should be so considered by the courts. The only intermingling is that the minimum extent analysis limits the exemption to the minimum extent necessary to make the program work. Under *Parker* the courts had often confused the two distinct issues; they were often intermingled under the factor that analyzed the intent of the enabling legislation. Even in *Parker* itself the Court had freely interchanged antitrust exemption issues with the commerce clause discussion. Because of *Parker's* long standing confusion of these issues, the *Cantor* court decided it was advantageous to pursue a new judicial approach where it could clearly draw the distinction between these important issues.

Conclusion

Because section II, the confinement of *Parker,* did not receive a majority vote, the lower courts are left in a confusing middle position. Technically, the traditional *Parker* doctrine remains valid, yet language resembling the federal immunity test and the minimum extent analysis received majority votes. The clear trend of the Court, especially in light of Blackmun's concurrence, is the confinement of *Parker* to state activity.

In the future a case will present itself with a fact situation which will justify the application of an exemption which is either the result of the state compulsion or congressional intent rationales. At that point, the prospective exemption for private parties which was created in *Cantor* will be put into practice as a respected exception to the federal antitrust laws.

Until that case presents itself, the antitrust bar is left with a strong indication by the Court as to the trend it intends to pursue in the granting of any future exemptions. Additionally, the Court has instituted the federal immunity approach, coupled with the minimum extent analysis, whenever the judiciary considers the issue of the validity of a state regulatory program in light of federal antitrust preemption questions. The conclusions concerning the immediate and prospective changes that have been wrought into the state action exemption are predicated upon a detailed analysis of both *Parker* and

Cantor. The trend appears to be toward a state action exemption which is narrowly drawn and which strongly resembles the tests utilized by federal courts in federal action cases.

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